UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MICHAEL B. ROSS,	:	
by his next friend DONNA DUNHAM,	:	
Petitioner,	:	Civil Action No.
	:	3:05 CV 758 (CFD)
v.	:	
	:	
THERESA LANTZ,	:	
COMMISSIONER OF CORRECTION,	:	
et al.	:	
Respondents.	:	

RULING ON PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS, COMPLAINT PURSUANT TO 42 U.S.C. § 1983 AND/OR EMERGENCY REQUEST FOR STAY OF EXECUTION PURSUANT TO 28 U.S.C. § 2251, AND APPLICATION FOR PRELIMINARY INJUNCTION

Michael B. Ross, who has been convicted of capital felony murder and sentenced to death by the State of Connecticut ("State"), is currently an inmate at Osborn Correctional Institution in Somers, Connecticut. He is scheduled to be executed on May 13, 2005 at 12:01 a.m. Ross has waived his right to further appeal that death sentence.[1]

Ross' sister, Donna Dunham, now has filed a petition for writ of habeas corpus on his behalf, challenging the Connecticut Superior Court's determination of Ross as mentally competent to make such a waiver and the Connecticut Supreme Court's affirmance of that decision. Dunham also moves for a preliminary injunction pursuant to 42 U.S.C. § 1983, staying her brother's execution until the State conducts a due process determination of whether Ross has the ability to waive his right to further legal proceedings.

[1] For a procedural history of Ross' convictions and all attendant post-conviction litigation, see State of Connecticut v. Michael Ross, SC 17422/SC 17423, slip op. at 2-19 (Conn. May 9, 2005).

As a necessary predicate to her petition for habeas corpus and application for preliminary injunction, Dunham first seeks an order by this Court granting her next friend standing to sue on her brother's behalf.[2] The respondents have filed a motion to dismiss this application and an objection to any stay of execution, on the ground that Dunham has failed to meet the criteria for next friend standing.

For the reasons discussed below, the Court finds that Dunham lacks standing to litigate as next friend of Michael Ross, and dismisses her petition and application for preliminary injunction on that basis.[3]

I. Legal Standard

A petition for writ of habeas corpus may be brought either by the "person for whose relief it is intended or by someone acting in his behalf." 28 U.S.C. § 2242. In Whitmore v. Arkansas, 495 U.S. 149 (1990), the Supreme Court listed the requirements that must by met by such a third party seeking appointment as next friend in order "to challenge the validity of a death sentence imposed on a capital defendant who has elected to forgo his right of appeal": the putative next friend must show that the "real party in interest is unable to litigate his own cause due to mental capacity, lack of access to court, or other similar disability."[4] Id. at 151, 165. The Court further

---

[2] Dunham has not filed a separate motion to proceed as next friend, but rather has included her request to proceed on that basis in the body of her habeas petition.

[3] This Court earlier made a similar examination in a suit brought by Dan Ross, Michael Ross' father, pursuant to 42 U.S.C. § 1983. In that case, as in this one, the Court found insufficient basis to allow a next friend to pursue legal action on Michael Ross' behalf. See Ross v. Rell, 2005 U.S. Dist. LEXIS 245 (D. Conn. Jan. 10, 2005).

[4] Whitmore also holds that a proposed next friend "must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate" and suggests a further prerequisite, that the next friend bear "some significant relationship with the real party in interest." Whitmore,

explained that this prerequisite could not be satisfied "where an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed, and his access to court is unimpeded." Id. at 165. The standard to be appointed next friend is the same whether the proposed next friend seeks relief through a petition for writ of habeas corpus or under 42 U.S.C. § 1983.[5] See generally id.; see also In re Zettlemoyer, 53 F.3d 24, 28 (3d Cir. 1995) (denying next friend intervention and dismissing habeas corpus petition filed on behalf of prisoner when petitioners "failed to prove that [prisoner] was incompetent" and when district court found prisoner had "knowingly, intelligently and voluntarily waived his right to proceed"). In any case, it is the proposed next friend's burden "clearly to establish the propriety of his status and thereby justify the jurisdiction of the court." Whitmore, 495 U.S. at 164.

II. Discussion

Dunham notes in her petition that the "Connecticut courts have determined that Mr. Ross is cognitively and volitionally competent to waive further appeals" and that she "does not challenge that determination." See Doc. # 1 at 2. Rather, Dunham claims that "no Connecticut court has ever determined whether Michael Ross' waiver of further appeals is in fact voluntary" and that Ross suffers from various mental personality disorders that prevent him from making such a voluntary waiver. Id. In support of her argument to proceed as next friend, Dunham

---

495 U.S. at 163-64. Though Michael Ross has indicated in previous state proceedings that he is estranged from his sister, the Court does not doubt the sincerity of Ms. Dunham's representation that she is acting in what she perceives to be Michael Ross' best interests. The Court also presumes Ross and Dunham to have a significant relationship by virtue of their being siblings. At any rate, it is the first Whitmore requirement that is dispositive in this case, and it is that test to which the Court directs its analysis.

[5] At the May 11, 2005 oral argument in this matter, counsel for both sides agreed that Whitmore was the appropriate standard to be applied in either type of case.

proffers the evidentiary record of Ross' most recent competency hearing in the Connecticut Superior Court, contending that the totality of this evidence supports a finding that Ross is psychologically unable to litigate on his own behalf. See Doc. # 9; see also State v. Ross, CR84-20300/CR84-20355/CR84-20356, slip op. (Conn. Sup. Ct. April 22, 2005) (Memorandum of Decision re: Competency and Voluntariness) (Clifford, J.).

The Court finds that Dunham has not met her burden of establishing that Michael Ross, the real party in interest, is unable to litigate his own claim due to mental incapacity, lack of access to the courts, or any other disability. Indeed, Dunham does not challenge the Superior Court's finding of Ross' mental capacity. Similarly, this Court finds that Judge Clifford's April 22, 2005 determination of Michael Ross' mental competence was adequately and fairly supported by the record, and therefore defers to the state court's conclusion on that issue. See Demosthenes v. Baal, 495 U.S. 731, 735 (1990) (holding that "a state court's conclusion regarding a defendant's competency" is entitled to a presumption of correctness on federal habeas review and may not be overturned unless it is not "fairly supported by the record.")[6]

Dunham's focus on whether Michael Ross has voluntarily waived his post-conviction rights is inapposite to the question of her standing. Under Whitmore, it is Dunham's burden to present evidence showing that Michael Ross is mentally incompetent or otherwise incapable of bringing this suit. Absent that showing, Mr. Ross is presumptively competent; any and all

[6] Nor does Ross lack access to the courts. He has been represented effectively by counsel throughout all post-conviction litigation. Mr. Ross' lawyer, T.R. Paulding, Jr., appeared at this Court's May 11, 2005 hearing. Attorney Paulding represented to the Court that Mr. Ross did not authorize or choose to participate in this case, and provided an affidavit from Mr. Ross to that effect. Dunham has not alleged in her complaint that Mr. Paulding has provided ineffective assistance of counsel, nor that Mr. Ross lacks access to the courts on any other basis.

challenges to his death sentence must be brought by him alone. Therefore, Dunham's claim fails for lack of jurisdiction before the Court may reach any question of voluntariness.[7]

Of course, Whitmore also provides that a defendant's mental competence automatically is satisfied when "an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed." Whitmore, 495 U.S. at 165. The Court finds Judge Clifford's findings in the Connecticut Superior Court on this matter well-supported and specific. Judge Clifford's memorandum of decision found both that Michael Ross' "mental disorders do not substantially affect his ability to make a rational choice among his options" and that "Michael Ross' decision to waive his right to further postconviction relief is knowing, intelligent, and voluntary . . . it is the product of a free autonomous choice."[8] See State v. Ross, CR84-20300/CR84-20355/CR84-20356, slip op. at 21 (Conn. Sup. Ct. April 22, 2005).

In addition, the Court makes an independent finding that Michael Ross is competent to proceed on his own behalf, and that the Court lacks a sufficient basis to appoint a next friend to litigate in his name. The Court has considered and applied many different standards of competence in determining which should apply in this action. Rule 17(b) of the Federal Rules of Civil Procedure provides that "the capacity of an individual . . . to sue or be sued shall be

---

[7] Counsel for the petitioner indicated at the May 11, 2005 oral argument that this Court was not required to conduct a separate evidentiary hearing on Ross' competence, as all necessary material was contained in the exhibits provided to and transcripts of the proceedings before Judge Clifford in the Connecticut Superior Court.

[8] Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), "when a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, a federal court may not grant relief unless the state court's adjudication of the claim 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law.'" Brown v. Payton, 125 S. Ct. 1432, 1438 (U.S. Mar. 22, 2005) (quoting 28 U.S.C. § 2254(d)(1)). Although the Court does not reach the merits of Dunham's claim, it notes for the record that AEDPA might well bar any disturbance of Judge Clifford's findings.

determined by the law of the individual's domicile." That rule would seem to implicate Conn. Gen. Stat. § 45a-644(b)-(c), which allows the probate court to appoint a temporary or permanent conservator when a person is "found to be incapable of caring for himself," further defined as suffering from "a mental, emotional, or physical condition resulting from mental illness, mental deficiency, physical illness or disability, chronic use of drugs or alcohol, or confinement, which results in the person's inability to provide . . . protection from physical abuse or harm and which results in endangerment to such person's health."

Federal case law provides still other competency standards. There is the federal standard of competency to stand trial, which provides that a defendant may not be put to trial unless he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him." See, e.g., Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)). That standard also has been stated in the federal statutes as the ability to understand the nature and the consequences of the proceedings against one or to assist properly in one's defense. See 18 U.S.C. § 4241(a). There is also the "heightened" standard required of defendants seeking to waive their constitutional rights. That standard is not a competency inquiry into those defendants' mental capacities, but rather a determination that the waiver was made knowingly and voluntarily. The Supreme Court has defined a satisfactorily "knowing and voluntary" waiver as one where the trial court has determined that "the defendant actually does understand the significance and consequences of a particular decision" and that the decision is "uncoerced." Godinez v. Moran, 509 U.S. 389, 401 (1993). And as discussed earlier, there is the standard set forth in Whitmore v. Arkansas, 495 U.S. 149 (1990), that a next friend

may not be appointed unless the real party in interest is shown to be "unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." Id. at 165.

Michael Ross exceeds the threshold required by all of these standards. In coming to this conclusion, the Court has reviewed a number of materials, including Dr. Michael Norko's psychiatric evaluations of Michael Ross in 1995 and 2004; the affidavit filed by Michael Ross in the Connecticut Superior Court on October 6, 2004, in which he expressed his wish to forgo further appeals or other litigation pertaining to his death sentence; the transcripts of the proceedings before Judge Clifford in the Connecticut Superior Court on October 6, December 9, December 15, and December 28, 2004; the transcripts of the proceedings before Judge Fuger in the Connecticut Superior Court on January 3, 2005; and the most recent decisions (and references to exhibits and transcripts noted therein) by Judge Clifford and the Connecticut Supreme Court in April and May 2005. Finally, this Court personally questioned and examined Michael Ross in a hearing held on January 7, 2005.

Despite suffering from various psychological disorders, Michael Ross never has been found incompetent to stand trial or to waive his right to appeal. The Court's own observation of Michael Ross at the hearing of January 7, 2005 confirms that he is competent under these standards. At that time, Michael Ross responded to the Court's questioning rationally and intelligently. Michael Ross is capable of caring for himself; he is capable of consulting with his lawyer and understanding the legal and factual issues before him with a high degree of rational understanding; and he has made a knowing and voluntary waiver of his right to bring further post-conviction legal action, one which was uncoerced and made in full understanding of the significance and consequence of that decision. Michael Ross has also been provided competent

and effective counsel by Attorney Paulding.

III. Conclusion

Therefore, the Court DENIES Donna Dunham's request for an order allowing her to proceed as next friend of Michael B. Ross. As Dunham lacks standing to pursue legal action on Michael Ross' behalf, her Petition for Writ of Habeas Corpus, Complaint Pursuant to 42 U.S.C. § 1983, and/or Emergency Request for a Stay of Execution Pursuant to 28 U.S.C § 2251, and Application for a Preliminary Injunction [Docs. 1, 2, & 3] are DISMISSED for lack of subject matter jurisdiction. See Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); see also Kontrick v. Ryan, 540 U.S. 443, 455 (2004) (holding that a district court may raise lack of subject matter jurisdiction sua sponte).

SO ORDERED this __12th__ day of May 2005 at Hartford, Connecticut.

/s/ CFD
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE